

**Before The
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Updating the Intercarrier Compensation)	WC Docket No. 18-155
Regime to Eliminate Access Arbitrage)	

**REPLY COMMENTS OF
THE SOUTH DAKOTA 9-1-1 COORDINATION BOARD**

Reply Comments of
The South Dakota 9-1-1 Coordination Board

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Introduction

The South Dakota 9-1-1 Coordination Board (hereinafter “the Board”) is a statutorily created body designed to set standards for public safety answering points, to oversee state 9-1-1 surcharge dollars, and to coordinate 9-1-1 services in South Dakota.¹ Comtech Telecommunications, Inc. (hereinafter “Comtech”) is contracted with the Board through its wholly owned subsidiary, NextGen Communications, Inc. (hereinafter “NextGen”), to provide South Dakota with a Next Generation 9-1-1 (hereinafter “NG9-1-1”) system.² The Board hereby submits these Reply Comments in response to the Comments filed on July 20, 2018 by Comtech that request this Docket be expanded to include “RLEC / CEA 9-1-1 / NG9-1-1 transport”.³

The Board asks that action not be taken solely on the South Dakota-specific facts as provided by Comtech. Comtech’s Comments omit important facts and procedures in place in South Dakota, which the Board feels are able to address the current situation. Moreover, Comtech’s Comments suggest several final interpretations of the Contract between Comtech and the Board, with which the Board disagrees. The Board further does not share the “assumptions” listed on page 4 of Comtech’s Comments. As this is not the appropriate venue to discuss those issues, the Board simply requests that the FCC, in reviewing Comtech’s filings, understand that disputes in interpretation of the Board/NextGen Contract and, apparently, South Dakota law do exist.

¹ SDCL 34-45-18 and SDCL 34-45-12.

https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=34-45-18
https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=34-45-12

² Per South Dakota law, the Contract can be accessed online at Open SD: <https://open.sd.gov/contracts/14/15-1400-025.pdf>

³ Comments of Comtech, filed with the FCC July 20, 2018, page 12.

The History of NG9-1-1/RLEC Transport in South Dakota

NextGen was granted CLEC certification by the South Dakota Public Utilities Commission (hereinafter “PUC”) on December 23, 2015.⁴ The South Dakota Telephone Association (hereinafter “SDTA”) intervened in the Docket and ultimately entered into a Joint Stipulation with NextGen.⁵ The Stipulation, in section 7, specifically reserved the transport responsibility issue that Comtech now brings, at least in part, to the FCC:

7. NextGen has indicated to SDTA that it “does not provide for the origination of the 911 call,” indicating that it does not believe that it has any responsibility for the transport of 911 traffic until it reaches its centralized point of interconnection (POI) in South Dakota. SDTA does not agree with this stated assessment or position. NextGen’s centralized POI will in many cases be far removed from existing rural carrier service areas and, relative to 911 traffic origination, 911 traffic exchange arrangements have historically recognized the local character of 911 calls and the more limited geographic presence of rural telephone companies -- 911 originated calls destined to centralized POI(s) of the statewide 911 services provider have generally been picked up at or near rural telephone company service areas, at long established “meet points.” The Parties agree that any certification(s) issued by the Commission in this proceeding granting any local exchange service or interexchange service authority to NextGen will not address this unresolved issue, and shall not affect or constitute any precedent relative to this, as of yet, unresolved transport obligations issue relating to the carriage of originated 911 traffic. In addition, neither this Stipulation nor any final Commission Order issued in this Docket shall preclude either SDTA, its member companies, or NextGen from later initiating a separate proceeding or proceedings with this Commission for a resolution of and to obtain compensatory relief that may be due related to this unresolved transport obligations issue.⁶

The Order granting CLEC Certification was not unanimous, but was pursuant to the Joint Stipulation.⁷ After entry of the Order, discussions continued between and among SDTA, the Board and NextGen. The South Dakota Network (hereinafter “SDN”) was also involved in some

⁴ The Order can be found at: <http://puc.sd.gov/commission/orders/telecom/2015/TC15-062.pdf>

⁵ The Joint Stipulation can be found at:
<http://puc.sd.gov/commission/dockets/telecom/2015/tc15-062/stipulation.pdf>

⁶ *Id.* pages 3-4.

⁷ The entire public Docket of NextGen’s CLEC Application can be viewed at:
<http://puc.sd.gov/Dockets/Telecom/2015/tc15-062.aspx>

discussions. Because of SDN's position as NextGen's subcontractor⁸ for the South Dakota NG9-1-1 project, however, the Board has attempted to funnel all communications through NextGen out of respect for NextGen's position as the Board's directly contracted provider. Discussions centered on the issues of what transport to the NG9-1-1 System's points of ingress would cost the RLECs, and memorializing any agreement to avoid creating a precedent of waiving the RLECs' special state and federal exemptions. Ultimately, no informal resolution could be reached. In 2017, the Board proposed to SDTA and NextGen that the Board would file a Petition for a Declaratory Ruling with the South Dakota PUC. The issue was discussed at the regular meeting of the Board on October 19, 2017. Representatives of both NextGen and SDTA appeared and indicated to the Board their support of such a step, and the Board authorized filing an action.⁹

First South Dakota PUC Action

The Petition for Declaratory Action was filed by the Board on October 27, 2017 and NextGen, SDTA and SDN were all granted intervenor status.¹⁰ The Board's Petition specifically cited SDCL 49-31-79:

Pursuant to 47 U.S.C. § 251(f)(1) as of January 1, 1998, the obligations of an incumbent local exchange carrier, which include the duty to negotiate and provide interconnection, unbundled network elements, resale, notice of changes and collocation, do not apply to a rural telephone company unless the company has received a bona fide request for interconnection, services, or network elements and the commission determines that the rural telephone company shall fulfill the request. The commission may only determine that the rural telephone company shall fulfill the request if, after notice and hearing pursuant to chapter 1-26, the commission finds that the request is not unduly economically burdensome the request is technically feasible, and the request is consistent with the universal service principles and provisions set forth in 47 U.S.C. § 254 as of January 1, 1998. The commission shall make such determination within one hundred

⁸ NextGen/Board Contract, Pages 14-15, Section 15.

⁹ The Minutes of the Board meeting can be obtained at:

<https://boardsandcommissions.sd.gov/bcuploads/10-19-17%20Board%20Mtg%20Minutes.pdf>

¹⁰ The Entire Docket of this proceeding, TC17-063, can be viewed at:

<http://puc.sd.gov/Dockets/Telecom/2017/TC17-063.aspx>

twenty days after receiving notice of the request. The person or entity making the request shall have the burden of proof as to whether each of the standards for reviewing the request has been met. Nothing in this section prevents a rural telephone company from voluntarily agreeing to provide any of the services, facilities, or access referenced by this section.

The Board believed that the two requests for interconnection that NextGen had sent to all carriers in South Dakota prior to the filing of the Petition constituted “bona fide requests” under the statute and thought all that remained was the determination by the PUC of whether or not the requests to the RLECs were technically feasible or unduly burdensome. Based on that statutory analysis, the Petition requested the PUC “rule as to whether it is NextGen or the rural carriers comprising SDTA that has the responsibility to transport 911 traffic between the rural carriers’ service areas and NextGen’s centralized points of interconnection.”¹¹

At a meeting with representatives of all parties and PUC staff in November 2017, the Board discovered that NextGen’s failure to file copies of the requests for interconnection with the PUC was a procedural bar to the discovery necessary to determine the costs, network specifications, etc. integral to resolution of the question of undue burden.¹² It was nonetheless felt that the declaratory process could provide useful guidance and all parties proceeded to file comments and reply comments. The Board was aware of, but did not participate in, negotiations between NextGen and SDTA during the pendency of the Petition.¹³

While Comtech’s Comments to the FCC in this Docket describe the dismissal of the Board’s Petition as “unfortunate”,¹⁴ NextGen actually filed a Motion to Dismiss on April 16,

¹¹ Petition for Declaratory Ruling, filed with the SD PUC October 27, 2017, page 3:

<http://puc.sd.gov/commission/dockets/telecom/2017/tc17-063/petition.pdf>

¹² Contrary to the allegation that no remedy exists, a long standing South Dakota PUC process is in place for discovery and adjudication of transport costs from RLEC services areas. See SDCL 49-31-79 above.

¹³ The details filed in footnote 22, page 8, of Comtech’s Comments in this Docket are more detailed than any information the Board ever received regarding a proposed settlement offer.

¹⁴ Comtech’s Comments, filed with the FCC July 20, 2018, page 7.

2018; a mere four days before Petition was scheduled for hearing on April 20th.¹⁵ The South Dakota PUC dismissed the Petition on its own motion finding that the factual issues raised were too extensive for a declaratory action, and suggested to the parties that a complaint docket would be more appropriate.

The Evolution of Law and Technology

The Board understands the juxtaposition of the arguments between NextGen and the RLECs-whether existing laws, admittedly not designed for IP-based systems, should still control. This tension between quickly emerging technology and the slower-moving legislative and legal processes is hardly unique to South Dakota's NG9-1-1 project.¹⁶ There is perhaps a slight twist in this scenario as NextGen argues its system has always been exempt from South Dakota's statutory scheme. In light of the South Dakota PUC proceedings, however, NextGen must adhere to the current law or undertake to change it, or at least the interpretation thereof. As partners in the South Dakota NG9-1-1 project, the Board has provided NextGen with a non-adversarial forum in which to make its arguments. With this understanding, and again, the relationship between the Board and NextGen, the Board has not moved to file a complaint against NextGen. But as the RLECs do cite the current law by which the entire project is bound, the Board has never felt it had grounds to file a complaint against the RLECs.

Second South Dakota PUC Action

As it appeared that voluntary resolution remained improbable, and no other party was going to file a complaint docket as prescribed by the PUC, the Board again took action. This

¹⁵ <http://puc.sd.gov/commission/dockets/telecom/2017/tc17-063/motiontodismiss.pdf> See also, Comtech's Comments, filed with the FCC July 20, 2018, page 5, footnote 11.

¹⁶ See for example, *Maryland v. King*, 133 S.Ct. 1958 (2013) (considering the constitutionality of routine DNA sampling of felony arrestees) and *Riley v. California*, 134 S.Ct. 2473 (2014) (discussing cell phones in the context of searches incident to arrest).

information was not included in Comtech's Comments in this Docket. The Board filed a second Petition for Declaratory Ruling with the South Dakota PUC on May 11, 2018.¹⁷ The second action was far narrower and directly asked the threshold question: "Does South Dakota law require bona fide requests as a prerequisite to determining if RLEC exemptions do or do not apply when a CLEC is requesting delivery of 9-1-1 traffic from an RLEC, assuming voluntary agreements are not feasible?"¹⁸ The question left open the possibility, per NextGen's previous arguments, that what they were requesting was not interconnection (although the requests sent by NextGen to South Dakota carriers used the term interconnection)¹⁹ in light of the fact that SDCL 49-31-79 as cited above also lists "services or network elements".

NextGen and SDTA were again both granted intervention, and NextGen moved more quickly to dismiss the second action.²⁰ NextGen's initial comments, distressingly, chose to malign the Board and allege that the Board's Petition was false and misleading, rather than work constructively toward a solution.²¹ While the Board was able to rebut these unfounded allegations by documentation and citations to the record,²² the Board was greatly disturbed by NextGen's preemptory statement that should the PUC choose to rule in the action, "NextGen would have no choice but to deny the decision's validity and any impact on NextGen."²³

¹⁷ Petition for Declaratory Ruling, filed with the SD PUC May 11, 2018:

<http://puc.sd.gov/commission/dockets/telecom/2018/tc18-013/petition.pdf> .

¹⁸ *Id.* at page 3. The entire second declaratory petition docket, TC18-013, can be viewed at:

<http://puc.sd.gov/Dockets/Telecom/2018/TC18-013.aspx>

¹⁹ Exhibit A to Board's Reply Comments filed with the SD PUC June 22, 2018:

<http://puc.sd.gov/commission/dockets/telecom/2018/tc18-013/exhibita062218.pdf>

²⁰ NextGen's Initial Comments and Motion to Dismiss filed with the SD PUC June 18, 2018:

<http://puc.sd.gov/commission/dockets/telecom/2018/tc18-013/nextgencomments.pdf> and Order Granting Intervention entered June 18, 2018: <http://puc.sd.gov/commission/orders/telecom/2018/TC18-013.pdf>

²¹ NextGen's Initial Comments and Motion to Dismiss filed with the SD PUC June 18, 2018:

<http://puc.sd.gov/commission/dockets/telecom/2018/tc18-013/nextgencomments.pdf>

²² Board's Reply Comments and Opposition to Motion to Dismiss, filed with the SD PUC June 22, 2018:

<http://puc.sd.gov/commission/dockets/telecom/2018/tc18-013/911replycomment.pdf>

²³ NextGen's Initial Comments and Motion to Dismiss filed with the SD PUC June 18, 2018, page 3, section 7.

All parties completed the comment and reply process. Thereafter, the PUC heard and took action on the Petition on June 26th, 2018. A written Order was issued on June 28th, 2018; nearly a month before Comtech filed their Comments in this Docket claiming the necessity of federal action due to the absence of a state action or remedy.²⁴ The Order states in part that “[t]he Commission finds that for a CLEC to successfully provide its telecommunications services throughout the state, it requires from other local exchange companies in South Dakota public switched telephone network connections, or in other words, interconnection.”²⁵ The Order denied NextGen’s Motion to Dismiss and in response to the Petition declared “[t]hat when a competitive local exchange carrier is requesting delivery of 9-1-1 traffic from a rural exchange carrier, it must submit a bona fide request for interconnection as contemplated in both state and federal law and file a copy of the request with the Commission.”²⁶

NextGen filed objections to the Order, which were heard by the PUC on July 26th, 2018. The PUC rejected NextGen’s proposed amended order.²⁷ The Board does not know if NextGen intends to file an appeal.

This Docket

The Board was also not aware that NextGen intended to ask the FCC to rule in this matter, and was only alerted to the request in this Docket after receiving an out of state inquiry about the Comments submitted by Comtech. Because Comtech’s Comments to the FCC in this matter failed to apprise the FCC of the second action in the South Dakota PUC, and most notably

²⁴ Order of the South Dakota Public Utilities Commission, dated June 28th, 2018:
<http://puc.sd.gov/commission/orders/telecom/2018/TC18-013noticeofentry.pdf>

²⁵ *Id.* page 2.

²⁶ *Id.*

²⁷ The written Order Denying Request to Adopt Proposed Amended Order was entered August 1, 2018:
<http://puc.sd.gov/commission/orders/telecom/2018/TC18-013final.pdf>

that an Order was entered as to how to proceed with resolution of this issue at the state level, the Board felt a responsibility to share that additional information.

Comtech's assertion to the FCC that "shared and overlapping authority by the FCC and state PUCs is well settled especially in the absence of appropriate PUC actions or remedies"²⁸ should be viewed in the light of several facts not included in Comtech's Comments:

1. The South Dakota PUC has entered an Order in this case making relevant findings as to how to resolve this issue at the state level, specifically by filing bona fide requests.

2. The PUC has stated on the record that complaint dockets in this matter would be appropriate; this instruction is directly applicable to the issues raised in Comtech's FCC Comments in this Docket, as the PUC has clearly indicated that Comtech/NextGen has a state forum to voice these same alleged grievances.

3. The statements Comtech describes as "definitive" have not been established by the South Dakota PUC or any other fact finder in South Dakota.²⁹

4. Comtech/NextGen has failed to take any independent actions at the state level to resolve these issues-in fact, they have moved to dismiss each of the two actions brought by the Board to address the problems the NG9-1-1 project faces.

5. The allegations that the proposed transport charges are usurious are based on numbers not adjudicated through the PUC process. It remains to be determined whether any charges at all would apply.

6. It is solely within NextGen's purview to file the requisite bona fide requests that would allow discovery and PUC review of any RLEC-proposed transport costs.

²⁸ Comtech's Comments filed with the FCC July 20, 2018, page 10, section C (emphasis added).

²⁹ *Id.* page 8.

Finally, Comtech's allegation that "[w]ithout FCC action, regulatory mandates are in danger of distortion and manipulation resulting in NG9-1-1 services being delayed or denied to citizens of South Dakota, and in future to many more Americans"³⁰ is inflammatory and unsupported by the South Dakota record. The statement is also in direct contradiction to assurances provided by NextGen to the Board that transporting RLEC traffic over legacy hardware will still provide South Dakota residents the desired NG9-1-1 level of service.

Conclusion

The Board has learned many things about the intricacies of implementing NG9-1-1. Foremost among them is that almost no portion of such an undertaking is simple. In light of that experience, the Board does not feel that simply adding RLEC / CEA 9-1-1 / NG9-1-1 transport to this Docket regarding Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage would do the matter justice. Many jurisdictions are implementing NG9-1-1 and have knowledge and experience to share, which would be pertinent to any FCC rule making on 9-1-1. Moreover, the Board believes that South Dakota state law and specifically the South Dakota PUC have in place processes and remedies to address its particular issues. NextGen's failures in South Dakota to follow existing law and procedures do not create the need for federal preemption. Even if the FCC determines that it wishes to take federal action in this area, the limited facts presented do not provide a sufficient basis on which to formulate sound policy.

³⁰ *Id.* page 3, Introduction.

Respectfully submitted this 3rd day of August, 2018,

/s/ Jenna E. Howell _____
Jenna E. Howell
Special Assistant Attorney General
Attorney for South Dakota
Department of Public Safety/
9-1-1 Coordination Board
118 West Capitol Avenue
Pierre, SD 57501
605-773-3178
jenna.howell@state.sd.us